IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-277

DOYON, LIMITED and
BERING STRAITS NATIVE CORPORATION,

Petitioners,

v.

BRISTOL BAY NATIVE CORPORATION; ARCTIC SLOPE REGIONAL CORPORATION; CALISTA CORPORATION; KONIAG INCORPORATED; NANA REGIONAL CORPORATION; SEALASKA CORPORATION; COOK INLET REGION, INCORPORATED; AHTNA, INCORPORATED; THIRTEENTH REGIONAL CORPORATION; CHUGACH NATIVES, INCORPORATED; CECIL D. ANDRUS, Secretary of the Interior; and W. MICHAEL BLUMENTHAL, Secretary of the Treasury,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Miscellaneous:

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Petitioners Doyon, Limited and Bering Straits Native Corporation respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 3, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, together with Judge Anderson's dissent, is reported at 569 F.2d 491, and has been attached as Appendix A. The decision of the United States District Court for the District of Alaska, which was reversed on appeal, appears at 417 F.Supp. 900, and has been attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1978. The petitioners subsequently filed a timely petition for rehearing and suggestion for rehearing en banc, which was denied by an order of the Court of Appeals dated May 25, 1978. (Appendix C.) This Court posseses jurisdiction under 28 U.S.C. §1254. In accordance with the requirements of 28 U.S.C. §2101(c) and Rule 22 of the Supreme Court Rules, this petition for a writ of certiorari was due on or before August 23, 1978, and thus has been timely filed.

QUESTIONS PRESENTED

Section 6(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. §1601 *et seq.* (1972 Supp.), provides that, "[a]fter completion of the roll prepared pursuant to section 5," all monies in the Alaska Native Fund shall be distributed among thirteen Regional Corporations "...on the basis of the relative numbers of *Natives enrolled in each region.*" (Emphasis added.) A majority of the Court of Appeals, reversing the District Court below, held that the underscored statutory language does not mean "Natives enrolled pursuant to section 5," but rather means "stockholders in each Regional Corporation"—a concededly different class of Native beneficiaries. In addition to the underlying issue

of whether this holding is correct, the questions here presented are:

(1) Whether this Court in *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1 (1976) sanctioned an approach to statutory construction so "flexible" that a lower court properly can invoke a single inconsistent reference in a Congressional committee report to alter the otherwise plain meaning of a statutory term.

(2) Whether the courts should accord "great deference" to an administrative interpretation of a statute where that interpretation is not longstanding or based upon any special agency expertise.

STATUTE INVOLVED

Section 6(c) of the Alaska Native Claims Settlement Act (hereinafter "ANCSA" or the "Claims Act"), 43 U.S.C. §1605(c), which provides in relevant part as follows:

> After completion of the role prepared pursuant to section 5, all money in the Fund ... shall be distributed at the end of each three months of the fiscal year among the Regional Corporations organized pursuant to section 7 on the basis of the relative numbers of Natives enrolled in each region.

STATEMENT OF THE CASE

A. The Nature of the Case.

This case involves the specific issue whether the Secretary of the Interior (hereinafter the "Secretary") acted improperly in excluding some 1,500 Natives enrolled in the regions of Doyon, Limited (hereinafter "Doyon") and Bering Straits Native Corporation

(hereinafter "Bering Straits") for purposes of determining the amounts to be distributed to the various Alaska Native Regional Corporations under section 6(c)[1] of the Claims Act. The Natives whose exclusion is here contested are residents of six villages within petitioners' regions which elected, under section 19(b) of ANCSA, to take title to their former reserves.

The respondents include all of the Alaska Native Regional Corporations except petitioners which were organized under the laws of the State of Alaska pursuant to provisions in the Claims Act. The respondent Cecil D. Andrus, the Secretary of the Interior, is the government official charged with primary responsibility for administering the provisions of ANCSA. The respondent W. Michael Blumenthal, the Secretary of the Treasury, is the government official charged with custody of all monies deposited in the Alaska Native Fund (hereinafter the "Native Fund" or "Fund") established under section 6 of the Claims Act.

B. The Facts.

The Claims Act provides for settlement of the aboriginal land claims of the Natives of Alaska. Among other rights and benefits provided to the Natives in return for extinguishment of their claims, the Alaska Native Regional Corporations will receive a total of $962,500,000 from the Native Fund—$462,500,000 through direct appropriation by Congress from the

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[1] As is shown at pp. 10-11, *infra*, the resolution of this question also will control implementation of sections 7(i) and 12(b) of ANCSA, which provide, respectively, that mineral and timber revenues generated by Regional Corporations, as well as certain land entitlements, shall be allocated on the basis of the relative numbers of enrolled Natives in each region.

general fund of the Treasury over an 11-year period (section 6) and the remaining $500 million through a two-percent share of revenues derived from mineral development within the State of Alaska (section 9).

Section 5 of ANCSA directed the Secretary of the Interior to prepare by December 18, 1973 a roll of all Alaskan Natives showing the region and village, if any, in which each Native resided on April 1, 1970, and enrolling each Native in accordance with such residence. On December 18, 1973, the Secretary completed and certified the required Native roll, which then showed 9,707 Natives enrolled in the Doyon region, of whom 410 were residents of the villages of Tetlin, Venetie and Arctic Village, and further showed 7,966 Natives enrolled in the Bering Straits region, of whom 1,073 were residents of the villages of Elim, Gambell and Savoonga.

The Secretary promulgated revised Native rolls on September 17, 1974, September 23, 1975, December 18, 1975 and September 30, 1976, to take into account enrollment errors, transfers of enrollment, and the results of various appeals concerning Native eligibility. The last revision showed 9,233 Natives enrolled in the Doyon region, of whom 428 were residents of the villages of Tetlin, Venetie and Arctic Village, and also showed 7,422 Natives enrolled in the Bering Straits region, of whom 1,076 were residents of the villages of Elim, Gambell and Savoonga.

Prior to passage of the Claims Act, all six of the above-named Native villages, among other Native communities, occupied land reserves which previously had been set aside for their use by legislation or Executive Order, or by action of the Secretary. Under section 19(b) of the Claims Act, these villages were

given the option to acquire full title to their land reserves,[2] and the six Doyon and Bering Straits villages elected to exercise that option. Section 19(b) provides, as the consequences of this election, that these villages "shall not be eligible for any other land selections under this Act or to any distribution of Regional Corporation funds pursuant to section 7, and the enrolled residents shall not be eligible to receive Regional Corporation stock." Section 19(b) does not state that the residents of these villages are to be disenrolled from the Doyon and Bering Straits regions for the purpose of section 6(c) or any other section of ANCSA.

Beginning on December 21, 1973, the Secretary authorized several distributions from the Native Fund. In calculating each Regional Corporation's share of all such distributions, the Secretary excluded from the total Native enrollment the residents of those villages which had exercised their section 19(b) option. As a result, the respective distributive shares of Doyon and Bering Straits were based on population figures which did not include, with respect to the Doyon regional population, some 428 residents of Tetlin, Venetie and Arctic Village enrolled in the Doyon region and, with respect to the Bering Straits regional population, some 1,076 residents of Elim, Gambell and Savoonga enrolled in the Bering Straits region.

If the Secretary, in determining each Native Regional Corporation's share of Native Fund distributions, had included the population of the Native villages which elected to acquire title to their reserves under section

[2]Under section 14(a) of ANCSA, the land entitlement of other Native villages is keyed to their respective populations and limited to the surface estate.

19(b), petitioners would have received an additional $3,905,000 through the September, 1975 distribution—about $735,000 more for Doyon and about $3,170,000 more for Bering Straits. Moreover, exclusion of the residents of the section 19(b) villages from the number of Natives deemed to be enrolled in each region for purposes of section 6(c), if allowed to stand, ultimately will cost Doyon approximately $3 million and Bering Straits almost $12 million in total distributions from the Native Fund.[3]

The Claims Act also provides that the Regional Corporations, other than the Thirteenth Regional Corporation, and the Village Corporations (other than those which made the section 19(b) election) will receive title to approximately 40 million acres of land. The election by the six named villages to acquire title to their former reserves adversely affects the amount of acregage to which Doyon and Bering Straits will be entitled under the land allocation provisions of section 12. Specifically, as a result of the operation of section 12, petitioners will suffer a net loss of 317,631 acres in their subsurface entitlement under ANCSA due to section 19(b) elections by Native villages in their regions, and respondent corporations will receive patents to the subsurface estate in an additional 317, 631 acres—a windfall to which they would not have been entitled absent such elections.

[3]Although exact dollar figures cannot now be determined, the exclusion of the residents of the section 19(b) villages from the number of Natives enrolled in each region will deprive petitioners of substantial additional distributions under the revenue sharing features of section 7(i)—a loss potentially greater than their loss of Fund monies. See note 4 *infra*.

C. Proceedings Below.

Petitioner Doyon originally filed this action on October 4, 1974 against the then Secretaries of the Interior and the Treasury in the United States District Court for the District of Columbia. The respondent NANA Regional Corporation, Inc. and petitioner Bering Straits thereafter moved to intervene, respectively, as defendant and plaintiff. All parties subsequently filed motions or cross motions for summary judgment, and the federal defendants moved, in addition, that the action be dismissed on the ground that other Regional Corporations not joined in the action were indispensable parties. In May, 1975, the District Court issued a Memorandum and Order which declined to act on the motions for summary judgment, denied the federal defendants' motion to dismiss, and transferred the case to the United States District Court for the District of Alaska on the ground that other Regional Corporations should be joined in the case to allow the expression of their views on the statutory question involved. In transferring the case, however, the District Court observed with respect to section 6(c):

> Plaintiffs contend that the statute is clear and should be read literally. They are aware, as are the defendants, that a literal reading of this section of the Act would compel the counting of Natives in the six '19(b)' Villages in ascertaining the population upon which the Fund distributions are made to the Regional Corporations. [*Doyon, Ltd. v. Kleppe*, Civil Action No. 74-1463 (D.C.D.C. Memorandum and Order), at 6.]

After the action was transferred, Doyon and Bering Straits amended their complaint and named the other Regional Corporations as defendants in addition to the Secretaries of the Interior and the Treasury. Petitioners

subsequently refiled their motion for summary judgment, and the various respondents filed cross motions for summary judgment.

On July 9, 1976, the District Court granted petitioners' motion. In doing so, the court held that, in light of the "clear" language in the Claims Act and "the legislative history of ANCSA and the other sections of that Act," the Secretary had acted improperly in excluding, for purposes of making distributions from the Native Fund to the Regional Corporations, Natives residing in the reservation villages.

The respondents subsequently filed separate but timely notices of appeal, which ultimately were consolidated. On February 3, 1978, the three-judge panel which heard the appeal handed down a decision which, by a two-to-one margin, reversed the judgment of the District Court. The petitioners subsequently filed a petition for rehearing and suggestion for rehearing en banc, which was denied by the Court of Appeals on May 25, 1978.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION IN IMPLEMENTATION OF A NEW AND UNIQUE LEGISLATIVE SETTLEMENT OF NATIVE CLAIMS, WHICH SHOULD BE DECIDED BY THIS COURT.

The Claims Act, which effects a comprehensive and far-reaching legislative settlement of Alaska Native land claims, provides more money and leaves more land in Native ownership than any previous treaty, agreement or statute for the extinguishment of aboriginal title in our nation's history. Under ANCSA, the Natives of

Alaska will receive fee title to over forty-four million acres of land, payments from the United States Treasury of $462.5 million over an eleven-year period, and a royalty of two percent up to a ceiling of $500 million on mineral development in Alaska—in other words, benefits which, conservatively estimated, are worth literally billions of dollars.

The Claims Act also is new and unique in other major respects. Rejecting traditional federal-Indian relationships, Congress directed that the settlement be administered through corporations organized under State law, and defined the precise manner in which Native funds and income from Native property were to be allocated. Within this statutory framework, though, the Natives retain relatively unfettered control over their assets, and are free from Bureau of Indian Affairs supervision. ANCSA thus represents a new departure in government dealings with Indians—a policy which places on the Natives the crucial task of translating the immediate benefits of the settlement into permanent, socially and economically productive enterprises.

A resolution of the underlying issue raised in this case will have a significant impact upon implementation of the Claims Act, including, in particular, how the substantial benefits described above are distributed among the Alaska Natives. More specifically, the phrase "Natives enrolled in each region," which appears in section 6(c) of ANCSA, also was used by Congress in sections 7(i) and 12(b). Section 7(i) requires that seventy percent of all revenues received by a Regional Corporation from the disposition of its timber resources and subsurface estate must be distributed among other Regional Corporations.[4] *See* 43 U.S.C. §1606(i) (1972

[4]The timber and mineral resources, collectively, of the Regional Corporations are vast. Indeed, their disposition [footnote continued]

Supp.). Section 12(b) provides for the allocation of millions of acres of Native lands among the Regional Corporations based upon the numbers of Natives enrolled in each region. *See* 43 U.S.C. §1611(b) (1972 Supp.). The case thus presents a critical question of statutory construction involving new, unique and important legislation, which should be addressed by this Court.

II.

THE COURT OF APPEALS HAS ADOPTED AN APPROACH TO STATUTORY CONSTRUCTION WHICH CONFLICTS WITH THE PRINCIPLE ESTABLISHED IN DECISIONS OF THIS COURT THAT LEGISLATIVE PROVISIONS CLEAR ON THEIR FACE MAY NOT BE ALTERED UNDER THE GUISE OF INTERPRETATION.

A. The term "Natives enrolled in each region" has a plain meaning.

Section 5 of ANCSA directed the Secretary of the Interior to prepare by December 18, 1973 a roll of all Alaskan Natives showing the region and village, if any, in which each Native resided on April 1, 1970, and enrolling each Native in accordance with such residence. Section 6(c) of the Claims Act provides that, "[a]fter completion of the roll prepared pursuant to section 5," all monies in the Native Fund shall be distributed among the various Regional Corporations "... on the basis of the relative numbers of Natives enrolled in each region." Within the context of the two directly relevant ANCSA provisions, the meaning of the section 6(c)

ultimately may produce revenues which far exceed those flowing through the Native Fund. Thus, the exclusion of residents of section 19(b) villages may well result in a diminution of section 7(i) revenues for petitioners which is even more than their loss of Native Fund monies.

term "Natives enrolled in each region" as being "Natives enrolled pursuant to section 5" seems plain on its face.[5]

Looking at the statute as a whole, section 7(i) of the Claims Act provides that certain revenues from timber resources and the subsurface estate shall be shared among the Regional Corporations "according to the number of Natives enrolled in each region pursuant to section 5," while section 12(b) provides that certain lands shall be allocated by the Secretary among eleven Regional Corporations "on the basis of the number of Natives enrolled in each region." Section 7(j) of ANCSA, by contrast, requires the distribution of funds "among the stockholders of the twelve Regional Corporations" and the word "stockholder" is used frequently elsewhere in the statute. *See, e.g.*, sections 7(m) and (o). In the context of the entire Claims Act, therefore, the meaning of the term "Natives enrolled in each region" again seems clear—and wholly distinct from the term "stockholders in each Regional Corporation."

In this case, however, the Court of Appeals, without explanation, declared that " 'Natives enrolled in each region' is susceptible to two different interpretations." 569 F.2d at 494. Citing *Train v. Colorado Pub. Interest*

[5]The Native residents of Tetlin, Venetie, Arctic Village, Elim, Gambell and Savoonga all were enrolled under section 5. Although Congress expressly provided for the loss of many other ANCSA benefits if a village elected to acquire its former land reserve, section 19(b) does not state that the residents of these villages were to be disenrolled from their regions for the purpose of section 6(c) or any other section of the Claims Act. As is evidenced by the treatment accorded members of the Metlakatla Indian Community in sections 3(b) and 19(a), on the other hand, Congress knew how to exclude Natives from the section 5 roll when it so intended.

Research Group, Inc., 426 U.S. 1 (1976), the court below further found a "more flexible Supreme Court approach" to statutory construction which, even under the circumstances here presented, required the use of extrinsic evidence in order to define a legislative term. Finally, on the basis of a single reference in a committee report on an earlier version of the Claims Act, the court concluded that the words "Natives enrolled in each region" really mean "stockholders in each Regional Corporation."

For the reasons set forth below and in Judge Anderson's dissent, petitioners submit that the Court of Appeals seriously misconstrued the *Train* opinion, and ignored the decisions of this Court holding that statutory language plain on its face cannot be declared ambiguous without good reason or be read out of legislation under the guise of interpretation.

B. Relevant decisions of this Court require that the term "Natives enrolled in each region," as used in section 6(c) of ANCSA, be given its plain meaning.

This Court repeatedly has ruled that unambiguous statutory terms must be accorded their plain meaning. In *Crooks v. Harrelson*, 282 U.S. 55 (1930), for example, the question was whether Congress, in using the word "and" to link several qualifying clauses in a piece of tax legislation, actually intended to state the statutory conditions disjunctively or conjunctively. In dismissing plaintiff's argument that an absurd result would occur if "and" were treated as a conjunction, the Court stated:

> It is urged, however, that if the literal meaning of the statute be as indicated above, that meaning

> should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress. . . . [T]o justify a departure from the letter of the law . . . the absurdity must be so gross as to shock the general moral or common sense. . . . And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. [*Id.* at 59-60.]

Similarly, in *United States v. Olympic Radio & Television, Inc.*, 349 U.S. 232 (1955), the Court rejected an argument that giving effect to statutory language which was clear on its face would produce an inequitable result.

The *Crooks* opinion also sets forth in detail the policy considerations justifying the foregoing rule:

> Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. . . . It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such a case the remedy lies with the law making authority, and

> not with the courts. [*Crooks v. Harrelson*, 282 U.S. at 60.]

Most recently, in *Tennessee Valley Authority v. Hill*, ____ U.S. ____, 57 L.Ed.2d 117 (1978), this Court emphatically has reaffirmed that the principles of statutory construction established in the *Crooks* and *Olympic Radio & Television* cases still are fully viable. Specifically, in response to TVA's suggestion that Congress could not possibly have intended the Endangered Species Act of 1973 to effect a halt in construction of a multimillion dollar federal project which already was near completion this court stated:

> It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional appropriations committees were apprised of its apparent impact upon the survival of the snail darter. *We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.*
>
> One would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to *insure* that actions *authorized, funded*, or carried out by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species. . . .' 16 U.S.C. §1536. (Emphasis added.) This language admits of no

exception. Nonetheless, petitioner urges, as do the dissenters, that the Act cannot reasonably be interpreted as applying to a federal project which was well under way when Congress passed the Endangered Species Act of 1973. *To sustain that position, however, we would be forced to ignore the ordinary meaning of plain language.*[6] [Emphasis added.] [*Id.* at 133.]

Analysis of the majority opinion below in light of the foregoing precedents makes inescapable the conclusion that the Court of Appeals violated the controlling principle of statutory construction established by this Court that unambiguous statutory language must be given its plain meaning. As previously pointed out (pp. 11-13, *supra*), when viewed in the context of both section 6(c) particularly and all provisions of ANCSA generally, the meaning of the term "Natives enrolled in each region" could hardly be more clear—and the Court below has furnished no rationale for its bald assertion to the contrary. Under such circumstances, as this Court observed in *Hill*:

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[6] Although the majority opinion in the *Hill* case makes reference to legislative history materials, the opinion also recites that under normal circumstances such documents are not to be consulted where statutory language is clear on its face:

> When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. *Ex parte Collett*, 337 U.S. 55, 61 (1949), and cases cited therein. Here it is not *necessary* to look beyond the words of the statute. We have undertaken such an analysis only to meet MR. JUSTICE POWELL's suggestion that the "absurd" result reached in this case, *post*, at ___, 57 L.Ed.2d 147, is not in accord with congressional intent. [Original emphasis.] [*Id.* at 140 n.29.]

> Our individual appraisal of the wisdom and unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. [*Id.* at 146.]

C. The Court of Appeals misconstrued this Court's decision in Train v. Colorado Public Interest Research Group, Inc.

In its decision below the Court of Appeals relied upon a new "more flexible Supreme Court approach" to statutory construction, citing *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1 (1976), which, in the majority's view, allegedly has superseded the principles established in the *Crooks, Olympic Radio & Television*, and *Hill* line of cases. In *Train*, the question presented was whether the Environmental Protection Agency possessed authority under the Federal Water Pollution Control Act Amendments of 1972 to regulate the discharge into waterways of nuclear waste materials which previously had been subject to the exclusive jurisdiction of the Atomic Energy Commission. The respondents there argued that the issue should be resolved in the affirmative because the term "pollutant," as defined by the Federal Water Pollution Control Act Amendments of 1972, included "radioactive materials." In resorting to the legislative history of the statute to clarify that issue, this Court observed:

> To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: 'When aid to

construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." '[7] [*Id.* at 9-10.]

Looking past the seemingly broad scope of the aforementioned language, however, to the actual facts and results, this Court blazed no new trails of statutory construction in the *Train* decision, and clearly did not authorize judges to substitute random pieces of legislative history for plain statutory language. First, in the *Train* case the Court was able to derive little assistance from the provisions of the Federal Water Pollution Control Act Amendments in determining how the word "pollutants" should be construed. Second, this ambiguity which the Court could not resolve by reference to the statute itself was the direct and explicit subject of voluminous amounts of legislative history.[8]

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[7] As this Court stated in Ex parte Collett, 337 U.S. 55 (1949), however, legislative history is never to be used to contradict or alter the clear meaning of statutory provisions:

> Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of §1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' [*Id.* at 61.]

Significantly, the *Collett* case was cited with approval by this Court in its *Hill* opinion. *See* Tennessee Valley Authority v. Hill, 57 L.Ed.2d at 140 n.29.

[8] The following legislative history, for example, was available to the Court:

> The term 'poliutant' as defined in the bill includes 'radioactive materials.' *These materials are those not*

[footnote continued]

Thus, measured in terms of its actual results, the *Train* case merely reaffirmed the line of cases which stands for the very narrow legal principle that, where the language on the face of a statute is ambiguous, a court is permitted to utilize persuasive legislative history to resolve the ambiguity. *See generally Kokoszka v. Belford*, 417 U.S. 642 (1974); *Cass v. United States*, 417 U.S. 72 (1974); *Perry v. Commerce Loan Co.*, 383 U.S. 392 (1966); *Mastro Plastics Corp. v. Nat'l Labor Relations Board*, 350 U.S. 270 (1956); *Markham v. Cabell*, 326 U.S. 404 (1945); *Harrison v. Northern Trust Co.*, 317 U.S. 476 (1943); *United States v. American Trucking Ass'n*, 310 U.S. 534 (1940);[9] *Helvering v. New York Trust Co.*, 292 U.S. 455 (1934); *The Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).[10]

> *encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that Act. 'Radioactive materials' encompassed by this bill are those beyond the jurisdiction of the Atomic Energy Commission.* Examples of radioactive material not covered by the Atomic Energy Act, and, therefore, included within the term 'pollutant," are radium and accelerator produced isotopes. H.R. Rep. No. 92-911, p. 131 (1972); 1 Leg. Hist. 818 (emphasis added). [*Id.* at 11.]

[9] In support of its approach to statutory construction, the *Train* Court relied explicitly on the *American Trucking Association* case and Cass v. United States—thus providing further evidence that the Court of Appeals below erred in reading the *Train* decision as an implicit rejection of the plain meaning rule.

[10] In its *Hill* opinion, this Court stressed the highly exceptional nature of *The Church of the Holy Trinity* case by reference to the *Crooks* decision, which represents—at least prior to the *Hill* litigation—this Court's most forceful affirmation of the legal principle that clear statutory language must be accorded its plain meaning:

> MR. JUSTICE POWELL's dissent places great reliance on *Church of the Holy Trinity v. United States*, 143 U.S.

[footnote continued]

In light of the specific facts in petitioners' case, the *Train* holding and its antecedents are totally inapposite. First, despite the Court of Appeals' conclusory statement that the term "Natives enrolled in each region," as used in section 6(c) of ANCSA, is "susceptible to two different interpretations," these words in context are patently unambiguous. The provisions of section 5 requiring the Secretary to prepare a Native roll by "region" and the references in section 6(c) to both the section 5 roll and "Natives enrolled in each region" can point to only a single meaning. Moreover, as demonstrated above, Congress' direction in section 7(i) that certain distributions be made on the basis of "the number of Natives enrolled in each region pursuant to section 5," as contrasted with its direction in section 7(j) that other distributions be made "among the stockholders of the twelve Regional Corporations," is ample evidence that Congress appreciated the distinction between "stockholders" and "enrolled Natives." In short, this case hardly satisfies the "ambiguity" requirement upon which the *Train* line of authority is premised.

Second, the legislative history upon which the Court of Appeals relied for its construction of section 6(c) does not begin to approach the level of persuasiveness which characterized the Congressional materials utilized in the *Train* decision. Here, after two years of active

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457, 459 (1892), *post*, at ___, 57 L.Ed.2d 152, to support his view of the 1973 Act's legislative history. This Court, however, later explained *Holy Trinity* as applying only in 'rare and exception circumstances. . . . And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail.' *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). [*Tennessee Valley Authority v. Hill*, 57 L.Ed.2d at 142 n.33.]

litigation, the Court of Appeals (as well as respondents) could cite only a single reference in a committee report "on an earlier version of the Act" in support of the proposition that Congress meant "stockholders of each Regional Corporation" when it said "Natives enrolled in each region."[11] 569 F.2d at 494-95. In no previous case has this Court sanctioned the interpretation of a statutory term contrary to its apparent meaning on the basis of evidence so flimsy. Thus, the Court of Appeals not only misconstrued the effect of the *Train* decision upon principles of statutory construction established by this Court,[12] but also did not even apply the *Train* standards correctly.

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[11]The Court of Appeals also cited the Senate committee report on ANCSA as demonstrating that all eligible Natives " 'are entitled to an *equal share* in assets provided as compensation for claims extinguished in the settlement.' " (Original emphasis.) 569 F.2d at 495. The Claims Act shows on its face, however, that the land entitlements of regions and villages vary materially, but not in direct relation to population, so each Native in fact receives a disproportionate share of the settlement assets. *See* 43 U.S.C. §§1611(b), 1611(c), 1613(a). The opinion below attempted to avoid this logical inconsistency by asserting that "the Act treats all eligible Natives on an equal basis with respect to the *monetary portions* of the settlement. . . ." (Emphasis added.) 569 F.2d at 495. The Court of Appeals' statement is not true in light of section 16(c) of ANCSA, and, moreover, is not what the Senate committee report cited in its support actually says.

[12]Significantly, even prior to this Court's decision in the *Hill* case, a number of other courts had refused to read the *Train* opinion as broadly as the Court of Appeals below. In Consolidated Rail Corp. v. United States, 567 F.2d 64 (D.C. Cir. 1977), for example, the court held, in the face of heavy reliance in a dissenting opinion on the *Train* case, that statutory language clear on its face could not be rewritten "by reference to the legislative history." *Id.* at 67.

III.

THE COURT OF APPEALS' DEFERENCE TO THE SECRETARY'S CONSTRUCTION OF SECTION 6(c) RAISES A SUBSTANTIAL QUESTION CONCERNING THE WEIGHT WHICH SHOULD BE ACCORDED ADMINISTRATIVE INTERPRETATIONS OF NEW LEGISLATION.

Based primarily upon this Court's decision in *Udall v. Tallman*, 380 U.S. 1 (1965), the Court of Appeals accorded considerable weight to the Secretary's decision to exclude Native residents of reservation villages for purposes of calculating section 6(c) distributions. For the reasons discussed below, the lower court's great deference to the Secretary's determination was wholly unwarranted.

The doctrine relied upon by the Court of Appeals, which is premised upon the assumption that the executive offices responsible for administering a statute should have added knowledge about its meaning and intent, has no application here because the Secretary's decision on the meaning and intent of section 6(c) did not require the exercise of any special agency expertise. *See Texas Gas Trans. Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960). In short, assuming, *arguendo*, that the Secretary were engaged in statutory construction, section 6(c) of the Claims Act was a new and unique legislative provision about which he possessed no greater knowledge or experience than the District Court judge.

The Secretary's decision, however, did not result from any attempt to "construe" or "interpret" ANCSA. Indeed, by the Secretary's own admission, his position was based on the view that, while the statutory language seems clear and would require inclusion of all Natives enrolled in petitioners' regions, adherence to the command of that language would create "an unjustified

disparity of benefits among the stockholders of the various regional corporations. . . ." Letter from the Solicitor of the Department of the Interior to petitioners' counsel, at 2 (attached as Appendix D). Thus, like the Court of Appeals' opinion below, the Secretary's decision did not grow out of a balanced effort to discern the statute's meaning, but rather reflected his personal views concerning the manner in which the Claims Act equitably should operate—notwithstanding the fact that Congress may have harbored no such intent.[13]

Furthermore, the great deference which the Court of Appeals has shown the Secretary's decision in this case is not consistent with legal standards established by this Court which govern the weight to be accorded agency determinations. First, deference is appropriate only with respect to a "... *longstanding* interpretation placed on a statute by an agency charged with its administration."[14] (Emphasis added.) *Nat'l Labor Relations Board*

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[13]The conclusion that the Secretary ruled on the basis of what he thought Congress would have wanted to do, instead of on the basis of what it actually did do, is shown in the following quotations from the Opinion of the Associate Solicitor upon which he relied (Record, at 40):

> Although the literal language of section 6(c) leads you to a contrary conclusion, we cannot believe that the Congress intended the Act to permit the stockholders in the various regional corporations to share unequally and inequitably in the Alaska Native Fund * * *.
>
> In all candor, it must be conceded that it is most probable that when drafting the Act, the legislators used the wrong phrase because they simply overlooked the implications of the word 'enrolled' for the people on reserves.

[14]Indeed, many courts have refused to treat an administrative interpretation of a statute with unusual deference if the construction has not occurred over significant periods of time. *See* Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973).

v. Bell Aerospace Co., 416 U.S. 267, 275 (1974). *Accord, Saxbe v. Bustos*, 419 U.S. 65 (1974). Second, an agency attempt to interpret a statute—and ultimately a court's deference to administrative construction—is appropriate only where legislative provisions are ambiguous in the first instance.[15] *See generally United States v. Southern Ute Tribe*, 402 U.S. 159 (1971); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

The reasons for the aforementioned requirements are apparent. Before the construction which an agency gives to a statute is entitled to be treated with unusual respect, it must be in existence sufficiently long for Congress to have the opportunity to indicate, normally by acquiescence in the agency position, that the legislative intent has been interpreted correctly. Moreover, the occasion for an agency to interpret or construe legislation should not arise if the statutory language itself speaks plainly.

Neither of the foregoing considerations exists in petitioners' case. The legal question which prompted the present proceedings became the subject of litigation immediately following the Secretary's decision. In addition, the Secretary's "interpretation" of ANCSA related to a provision which was unambiguous in the first instance—a point which, as a matter of record, the Secretary has freely conceded. Under such circumstances, his opinion is entitled to no special deference.

[15]This limitation is consistent with the principles of statutory construction established by this Court in the *Crooks* and *Hill* line of cases. An administrative agency's attempt to "interpret" legislation in a manner which conflicts with clear statutory language is entitled to no special deference.

Finally, the principle that an administrative interpretation of legislation is entitled to great weight does not mean that a court is obligated to defer if the construction is wrong. As this Court emphasized in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261 (1968):

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.'...But the courts are the final authorities on issues of statutory construction ... and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' ... "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia. ...' [*Id.* at 272.]

Accord, Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973); *Nat'l Labor Relations Board v. Brown*, 380 U.S. 278 (1965); *American Ship Building Co. v. Nat'l Labor Relations Board*, 380 U.S. 300 (1965); *see generally Federal Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Estate of Sanford v. Comm'r*, 308 U.S. 39 (1939); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933). Thus, the Secretary of the Interior's decision to exclude, for purposes of making distributions under section 6(c), Natives residing in reservation villages by no means should be permitted to bootstrap a court to the same erroneous conclusion.

CONCLUSION

The Court below wrongly decided a key question in the implementation of a new and unprecedented statute effecting the legislative settlement of Native land claims. Furthermore, the decision of the Court of Appeals below is totally inconsistent with principles of federal law established by this Court which require that legislative provisions clear on their face cannot be altered in the name of statutory "interpretation" or "construction." Finally, the Court of Appeals' deference to the Secretary's construction of section 6(c) conflicts with the decisions of this Court concerning the weight which should be accorded administrative interpretations of legislation.

For all the foregoing reasons, petitioners respectfully urge that the petition for a writ of certiorari be granted. In the alternative, petitioners request that the case be remanded to the Court of Appeals for reconsideration in the light of *Tennessee Valley Authority v. Hill*, ____ U.S. ____, 57 L.Ed.2d 117 (1978).

Respectfully submitted,

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APPENDIX

APPENDIX A

DOYON LIMITED et al.,
Plaintiffs-Appellees,

v.

BRISTOL BAY NATIVE CORP.,
Defendant-Appellant.

DOYON LIMITED et al.,
Plaintiffs-Appellees,

v.

ARCTIC SLOPE REGIONAL CORP.,
Defendant-Appellant.

DOYON LIMITED et al.,
Plaintiffs-Appellees,

v.

CALISTA CORP., Defendant-Appellant.

DOYON LIMITED et al.,
Plaintiffs-Appellees,

v.

KONIAG, INC., Defendant-Appellant.

DOYON LIMITED et al.,
Plaintiffs-Appellees,

v.

NANA REGIONAL CORP., INC.,
Defendant-Appellant.

DOYON LIMITED et al.,
Plaintiffs-Appellees,

v.

SEALASKA CORP., Defendant-Appellant.

DOYON LIMITED et al.,
Plaintiffs-Appellees,

v.

COOK INLET REGION,
Defendant-Appellant.

DOYON LIMITED, et al.,
Plaintiffs-Appellees,

v.

AHTNA, INC., Defendant-Appellant.

DOYON LIMITED et al.,
Plaintiffs-Appellees,

v.

13TH REGIONAL CORP.,
Defendant-Appellant.

DOYON LIMITED et al.,
Plaintiffs-Appellees,

v.

CHUGACH NATIVES, INC.,
Defendant-Appellant.

DOYON, LIMITED et al.,
Plaintiffs-Appellees,

v.

Cecil D. ANDRUS, Secretary of the Interior and W. Michael Blumenthal, Secretary of the Treasury,

Defendants-Appellants.

Nos. 76-3658, 76-3681 to 76-3685, 76-3710, 76-3754, 76-3748, 77-1166 and 77-1084.

United States Court of Appeals, Ninth Circuit.

Feb. 3, 1978.

Rehearing and Rehearing En Banc

Denied May 25, 1978.

John J. Zimmerman (argued), Dept. of Justice, James R. Atwood, Washington, D. C., James F. Vollintine, Hal R. Horton, Anchorage, Alaska, Gerald D. Stoltz, Washington, D. C., Milton M. Souter, Kodiak, Alaska, Edward Weinberg, Richard A. Baenen (argued), E. Foster DeReitzes, Washington, D. C., Joseph Rudd, Anchorage, Alaska, Jonathan Blank, Washington, D. C., for defendants-appellants.

Arthur Lazarus, Jr. (argued), Washington, D. C., for plaintiffs-appellees.

Appeal from the United States District Court for the District of Alaska.

Before WRIGHT, CHOY and ANDERSON, Circuit Judges.

CHOY, Circuit Judge:

FACTS AND PROCEEDINGS BELOW

Appellees Doyon, Ltd. and Bering Straits Native Corprations, together with the eleven corporate appellants,[1]

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[1] Ahtna, Inc., the Aleut Corporation, Arctic Slope Regional Corporation, Bristol Bay Native Corporation, Calista Corporation, Chugach Natives, Inc., Cook Inlet Region, Inc., Koniag, Inc., NANA Regional Corporation, Inc., Sealaska Corporation, and the 13th Regional Corporation. Each of these corporations embraces a region, except the 13th Regional Corporation which was established for the benefit of non-resident natives who elected to be enrolled in it.

constitute the Alaska Native Regional Corporations (Regional Corporations) created pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* (ANCSA). Corporate appellants and the Secretaries of the Interior and the Treasury[2] appeal from a district court Memorandum and Order granting summary judgment in favor of appellees. We reverse.

ANCSA's primary purpose is to provide a "fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). Accordingly, each of the twelve regions has been subdivided into villages, and the Alaska Native Village Corporations (Village Corporations) have been established. 43 U.S.C. § 1607.

To effectuate the legislative plan, an Alaska Native Fund (Fund) has been created, into which $962,500,000 will ultimately be deposited for distribution to the Regional Corporations. 43 U.S.C. § 1605. The fund is to be parceled out in quarterly installments to the Regional Corporations according to the "relative numbers of Natives enrolled in each region." 43 U.S.C. § 1605(c).

In lieu of sharing in Fund distribution, 43 U.S.C. § 1618(b) gave Native villages situated on reserve lands[3] the option to acquire title to the surface and subsurface land in fee. Doyon Region villages of Tetlin, Venetie,

[2]The Secretary of the Interior is the government official primarily responsible for implementing the provisions of the Act, and the Secretary of the Treasury has custody of all funds deposited in the Alaska Native Fund.

[3]"Reserve land" refers to land which has been set aside in Alaska by legislation or Executive or Secretarial Order for Native use and administration of Native affairs prior to the effective date of the Act.

and Arctic Village, and Bering Straits Region villages of Elim, Gambell, and Savoonga elected to acquire title to their reserves in this manner. As fee owners they do not have to share the revenues derived from their land with their respective Regional Corporations. On the other hand, these villages are *not* entitled to receive stock in the Regional Corporations and accordingly, forfeit the right to receive distributions from the Fund.[4]

In December 1973 the Secretary of the Interior (Secretary) completed and certified enrollment of Natives in Regional and Village Corporations. Enrollment of all Natives was required before the reserve land election could take place, but only those Natives not making the land election became shareholders of their respective regions. Distribution from the Fund based on numbers of Natives enrolled and holding stock in each region began. 43 U.S.C. § 1605(c).[5] The Secretary *excluded* Natives

[4]Title 43 U.S.C. §1618(b) provides in part:

> [T]he Village Corporation shall not be eligible for any other land selections under this chapter or to any distribution of Regional Corporation funds pursuant to section 1606 of this title, and the enrolled residents of the Village Corporation shall not be eligible to receive Regional Corporation stock.

[5]As a direct result of the lower court's order construing 43 U.S.C. §1605(c) against the Secretary and the defendant corporations, approximately $14,768,402 from the Alaska Native Fund will be directed to plaintiff corporations at the expense of the other Regional Corporations. The appellants would receive approximately $12,225 *per stockholder*, while plaintiffs Doyon and Bering Straits would receive $12,819 and $14,298, respectively, *per stockholder*.

In contrast, if nonstockholders are not counted, all Regional Corporations will receive precisely the same amount of money *per stockholder*, approximately $12,464 each.

living in landed villages in calculating the distributive shares for Doyon and Bering Strait Regions.

Doyon and Bering Straits protested the exclusion and initiated suit. The United States District Court for the District of Alaska held that Natives with title to fee land were *includable* for calculations of distributive shares from the Fund.[6] *Aleut Corp. v. Arctic Slope Regional Corp.*, 417 F.Supp. 900, 904-06 (D.Alaska 1976).

The sole issue on appeal is whether Native members of villages which elected to take title to reserve lands in lieu of all other benefits under the Act may be counted by the Regional Corporations for purposes of calculating their proportional shares of the Fund.[7] We hold they cannot for the following reasons.

We conclude that: (1) the term "Native" in certain portions of the Act was intended to refer to *stockholders* of the Regional Corporations, and that legislative history demonstrates that only *stockholders* were intended to be

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[6]Title 43 U.S.C. §1605(c) provides:

> After completion of the roll prepared pursuant to section 1604 of this title, all money in the Fund, except money reserved as provided in section 1619 of this title for the payment of attorney and other fees, shall be distributed at the end of each three months of the fiscal year among the Regional Corporations organized pursuant to section 1606 of this title on the basis of the relative numbers of Natives enrolled in each region. The share of a Regional Corporation that has not been organized shall be retained in the Fund until the Regional Corporation is organized.

[7]The court's resolution of this issue will not only have an immediate and direct effect on the amount of Fund monies that will reach each individual Native, but will also, by implication, affect each Regional Corporation's share of natural resource revenues and land allocations under sections 1606(i) and 1611(b), respectively, since they contain the same operative phrase *"Natives enrolled."*

counted in calculating distributive shares for each Regional Corporation; (2) appellants' argument for equality of benefits is viable in absence of evidence that Doyon and Bering Straits need a greater per-shareholder amount in order to provide services to villages holding land in fee; and (3) this Court will give great deference to the interpretation of the Secretary, the federal official with responsibility for administering the Act.

CONSTRUCTION OF § 1605(c)

Title 43 U.S.C. § 1605(c) provides:

> After completion of the roll prepared pursuant to section 1604 of this title, all money in the Fund, . . . shall be distributed . . . on the basis of the relative numbers of *Natives* enrolled in each region. (emphasis added).

Based on this language, according to the district court, Natives who are not stockholders are to be included to determine the distributive share for Doyon and Bering Straits even though they may not participate in the distribution. We disagree.

Formerly, statutory construction in this Circuit was dominated by the "plain meaning rule" which precluded the use of extrinsic evidence to determine the meaning of a statute, the language of which seemed clear on its face. *See I. T. T. Corp. v. G. T. & E. Corp.*, 518 F.2d 913, 917-18 (9th Cir. 1975); *Easson v. C. I. R.*, 294 F.2d 653, 656 (9th Cir. 1961). *But see Greyhound Corp. v. United States*, 495 F.2d 863, 868 (9th Cir. 1974). However, in light of a recent Supreme Court case, the viability of that rule is questionable, and it appears that

> [W]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'

Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1975) (footnotes omitted), citing *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940). We find that under the more flexible Supreme Court approach the present circumstances require exploration of extrinsic evidence because "Natives enrolled in each region" is susceptible to two different interpretations.

Relevant legislative history leads us to conclude that Congress intended the regions to share as nearly as possible on an equal basis, and did not intend to sanction disparate distribution of the Fund based on unforeseen semantic problems.[8] For example, the House Committee on Interior and Insular Affairs reporting on an earlier version of the Act, which contained the same operative language—"Natives enrolled in each region"—discussed the distribution of resource revenues:

> In order that all Natives may *benefit equally* from any minerals discovered within a particular region, each corporation must share its mineral revenues with the other 11 corporations *on the basis of the relative numbers of stockholders in each region.*

H.Rep. 92-523, 92d Cong., 1st Sess. 6, *reprinted in* [1971] U.S.Code Cong. & Ad. News 2192, 2196 (emphasis added).

Secondly, appellants argue and we agree that the entire scheme of the Act treats all eligible Natives on an equal

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[8] *E.g.*, Appellees argue that while express language prohibits landed Natives from receiving shares from the Fund, nothing prohibits their Regional Corporations from receiving monies on behalf of villages making the fee land election. Such interpretation of this statute represents a torturing of Congressional intent expressly aimed at equality of benefits. *See* 43 U.S.C. § 1601(a).

basis with respect to the monetary portions of the settlement, and that this may only be accomplished by excluding landed Natives in calculating distributive shares.

A report by the Senate Committee on Interior and Insular Affairs, discussing the settlement bill which initially passed the Senate, S. 35, 92d Cong., 1st Sess. (1971), stated:

> The settlement is statewide and applies to all Alaska Native groups; all eligible Natives regardless of their ethnic affiliation or their location are entitled to an *equal share* in assets provided as compensation for claims extinguished in the settlement.

S. Rep. 92-405, 92d Cong., 1st Sess. 79 (1971) (emphasis added).

While a literal reading of § 1605(c) authorizes Natives who are not stockholders to be included in the calculations defining distribution shares for Doyon and Bering straits, such construction is inconsistent with Congress' expressed desire for equality.[9] We therefore hold that

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[9] Insertion of the word "Native" rather than stockholder may have resulted from the complex scheme for organizing individuals entitled to assert claims under the Act. Necessarily, enrollment was required prior to the election to take land in fee because the enrollment of villages determined the vote required for a village to effect the election.

Title 43 U.S.C. § 1601(a) provides:

> The Native residents of each Native village entitled to receive lands and benefits under this chapter shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this chapter, except as otherwise provided.

But ANCSA viewed as a whole plainly does not intend to favor Natives in regions which happened to contain villages making the election. For example, 43 U.S.C. § 1606(g) provides:

[footnote continued]

only stockholders are to be counted in calculating distributive shares for each Regional Corporation.

JOINT REGIONAL AND VILLAGE CORPORATION VENTURES

Two sections of the Act allude to joint ventures between Regional and Village Corporations. Doyon and Bering Straits maintain that such joint ventures cannot be successfully carried out by them unless they receive a greater per-shareholder distribution than regions without landed villages. Title 43 U.S.C. § 1606(l) provides:

> Funds distributed to a Village Corporation may be withheld until the village has submitted a plan for the use of the money that is satisfactory to the Regional Corporation. The Regional Corporation may require a village plan to provide for joint ventures with other villages, and for joint financing of projects undertaken by the Regional Corporation that will benefit the region generally. In the event of disagreement over the provisions of the plan, the issues in disagreement shall be submitted to arbitration,

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> The Regional Corporation shall be authorized to issue such number of shares of common stock, . . . as may be needed to issue one hundred shares of stock to each Native enrolled in the region. . . .

The Act's language taken literally authorizes the Regional Corporations to issue as many shares of stock as is necessary to provide 100 shares to "each *Native* enrolled in the region." (emphasis added).

It now appears that Congress intended that each *Native eligible to receive Regional Corporation stock* would be issued exactly 100 shares. To reach this result, the Regional Corporations should have been authorized to issue such number of shares of common stock as would be needed to provide 100 shares to each *stockholder*, that is, individual eligible to receive stock in the Regional Corporations.

> as shall be provided for in the articles of incorporation of the Regional Corporation.

Title 43 U.S.C. § 1606(m) provides:

> When funds are distributed among Village Corporations in a region, an amount computed as follows shall be distributed as dividends to the class of stockholders who are not residents of those villages: The amount distributed as dividends shall bear the same ratio to the amount distributed among the Village Corporations that the number of shares of stock registered on the books of the Regional Corporation in the names of nonresidents of villages bears to the number of shares of stock registered in the names of village residents: *Provided*, That an equitable portion of the amount distributed as dividends may be withheld and combined with Village Corporation funds to finance projects that will benefit the region generally.

These two sections require the Regional Corporations to be active participants in the development of their reions and not merely conduits for Fund distributions.

It appears, however, that Congress intended the joint ventures alluded to to benefit only the *stockholders* of the region—notwithstanding the language "projects that will benefit the region generally." Neither 43 U.S.C. § 1606(*l*) nor § 1606(m) seems applicable to the villages holding fee land since the Regional Corporation has no authority to control activities in those villages and the Natives are not entitled to receive distributions from the Fund or stock. Moreover, we can discern nothing in the Act or its history indicating that the Regional Corporations of Doyon or Bering Straits have any obligations or duties to those villages. On this basis we reject appellees' contention that they require a greater per-shareholder amount in order to provide services to the landed villages within their regions.

DEFERENCE TO THE SECRETARY'S INTERPRETATION

After the Secretary initiated the distribution of the Fund, Doyon wrote him concerning a "serious error" made in calculating its share—the failure to count all Natives enrolled in the region. The Department denied Doyon's request for adjustment, stating:

> Although Section 6(c) [43 U.S.C. § 1605(c)] provided for distributions of the . . . Fund . . . "on the basis of the relative numbers of Natives enrolled in each region" . . . we do not believe that the Congress could have intended to include for such purposes those individuals rendered ineligible . . . to participate in the redistributions. . . . *Such an application . . . would result in a substantial and unjustified disparity of benefits among the stockholders of the various regional corporations which cannot be rationally supported.* (emphasis added).

The Secretary's decision was supported by a comprehensive memorandum stating that inclusion of landed Natives would result in a "windfall" for Doyon and Bering Straits.

The principal responsibility for administering the Act lies with the Secretary and his interpretations of the statute are entitled to "great weight" upon judicial review. *Hamilton v. Butz*, 520 F.2d 709, 714 & n. 9 (9th Cir. 1975); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1964). In *Tallman* the Supreme Court stated:

> When faced with a problem of statutory construction, this Court shows *great deference* to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, *we need not find that its construction is the only reasonable one,* or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." [citations omitted]. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." [citation omitted]

380 U.S. at 16, 85 S.Ct. at 801 (emphasis added). *See also California ex rel. Dep't of Transp. v. United States ex rel. Dep't of Transp., Fed. Highway Administration,* 547 F.2d 1388, 1390-91 (9th Cir. 1977); *Patagonia Corp. v. Board of Governors of the Federal Reserve System,* 517 F.2d 803, 812 (9th Cir. 1975).

Additionally, Doyon and Bering Straits allege that "[t]o date the Secretary has evidenced no particular expertise" in the construction of the Act, and that the courts have "repeatedly rejected his interpretation and administration of the Claims Act." The Secretary's "track record" with respect to the administration and interpretation of the Act has no bearing on the weight to which his interpretations are entitled upon judicial review. The district court erred in failing to give the Secretary's interpretation of the term "Natives enrolled" the "great weight" or "great deference" to which it was entitled. *Hamilton v. Butz, supra; Udall v. Tallman, supra.* We find appellees' criticisms of other interpretations of the Act by the Secretary to be irrelevant to this review.

For the above reasons we hold that the district court's Memorandum and Order granting summary judgment in

favor of appellees should be reversed, and that the Secretary's method of computation of the distributive shares for each region of the Fund should be continued. [10]

REVERSED.

J. BLAINE ANDERSON, Circuit Judge, dissenting:

Surely, the field of statutory construction so often confronted by justices and judges in the federal judicial system is one of the most prolific sources of differences of opinion in a system where differences of opinion are endemic.[1] I respectfully dissent and add some support to this assertion.

For the reasons stated by the district judge, I would affirm (417 F.Supp. 900), but add thereto some further analysis and observations.

The district judge paid "some deference" to the Secretary's decision. He was required to do no more. Great deference to the Secretary's decision is usually required only where there has been a consistent construction by an administrative agency over a period of time, and within his expertise and power. That is not this case. The Secretary has no power or authority to "alter provisions that are clear and explicit . . .." He has no authority to avoid the direct "shall distribute" command of 43 U.S.C. § 1605(c). *Louisville & Nashville R. Co. v. United States,* 282 U.S. 740, 759, 51 S. Ct. 297, 75 L.Ed. 672 (1931); *Swain v. Brinegar,* 517 F.2d 766, 777 n. 14 (7th

[10] Appellants put forth a vague equal protection claim which we consider to be without merit.

[1] See generally, Aldisert, *The Judicial Process,* pp. 170-235, West Publ. Co., 1976.

Cir. 1975); *Patagonia Corp. v. Board of Governors of Fed. Reserve System,* 517 F.2d 803, 812 (9th Cir. 1975). We have already declined to afford deference to the Secretary's attempt under ANSCA to establish a cutoff date for arbitration of land claims under 43 U.S.C. § 1606(a). *Central Council of Tlingit, et al. v. Chugach Native Ass'n.,* 502 F.2d 1323, 1325 (9th Cir. 1974). There, as here, the language of Congress was an explicit command. The Secretary's decision here is new and has the appearance of being a "one-shot" conclusive determination on all future fund distributions which fly in the face of a direct Congressional command.

In my view there is no "fair contest between two readings" of the statute in question. "A problem in statutory construction can seriously bother courts *only* when there is a contest between probabilities of meaning."[2] (emphasis added) As I read the majority opinion, we have no such contest. We agree as to the meaning of "stockholder" and "Natives enrolled" wherever they appear in ANSCA. We also seem to agree in their logical placement in the various sections of the Act, save one.

The majority opinion, it seems to me, sets a bad potential precedent in appearing to sanction an executive departmental decision to "gerrymander" what are statutory words of clear and unambiguous meaning in order to effectuate the executive viewpoint of an equitable remedy rather than the legislative directive of remedy.

This is not a case of interpreting ambiguous wording in a vague statute. Nor can it be said that using the words

[2] Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum.L.Rev. 527 (1947).

in their statutory context leads to an absurd result.[3] In my opinion, even the most fair-minded person could not say with comfortable assurance that distribution under § 6(c) based on the measure of "Natives enrolled" leads to an uncontemplated inequitable result nor thwarts legislative purpose. The statutory words have a clear, definite, statutorily-defined meaning. Were the statutory structure and its policy and purpose vague[4] and its words ambiguous there could be no quarrel with the majority's approach. It would be permissible judicial interpretation thrust upon the court (either intentionally or negligently) by the Congress. Here the word "stockholder" and the phrase "Natives enrolled" both have clearly ascertainable meanings drawn from the Act itself and they make logical and cohesive sense in their usage in the various sections of the Act. Only when applied to a precise factual distribution of funds does the statute excite in some a feeling of inequity. This administratively perceived inequity

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[3] In *I.T.T. Corp. v. G.T.E. Corp.*, 518 F.2d 913, 917-18 (9th Cir. 1975), we find that:

> "There are two circumstances in which this court may look beyond the express language of a statute in order to give force to Congressional intent: where the statutory language is ambiguous; and where a literal interpretation would thwart the purpose of the over-all statutory scheme or lead to an absurd result." (footnotes omitted)

[4] There is no need for this court to search for or to speculate about the legislative policy or purpose nor for us to disagree once we find it. It is clearly and unambiguously stated in § 2(a) and (b), of ANSCA (43 U.S.C. § 1601(a) and (b)). The Act is to provide an immediate and rapid "fair and just settlement of all claims" and "without litigation." The latter reinforces the observation, infra, that the Congress by the annual reporting requirements may well have reserved to itself the right and power to resolve inequities and the practical problems that develop with experience. In any event, "fair and just" does not mean perfect equality.

then is transformed into statutory ambiguity and vagueness justifying the transposition of words having completely separate and distinct meanings into a new location within the statutory framework to achieve the administrator's perception of equity (i.e., "stockholder" to § 6(c) in place of "Natives enrolled"). Based on this logic, the Secretary assumes that Congress and its committees must have made a "mistake." However, the legislative history and records demonstrate beyond any realistic doubt that the language in question was knowingly and deliberately used by the Congress in constructing this legislation to deal with a pressing and complex problem. In addition, the Secretary and his aides participated extensively in assisting the Congress in its formulation of ANCSA. Substituting different words or phrases for otherwise clear ones is not statutory construction of vague or ambiguous language (the proper role of the judiciary in interpreting and construing statutes). Rather, it is purely and simply administrative and judicial "legislating" undertaken to correct a perceived Congressional "mistake" when there is no evidence to support the theory that there has, in fact, been a mistake made. Moreover, neither the Secretary, counsel for appellants, nor the majority cite any authority that the Secretary or this court is empowered to correct an alleged Congressional mistake in this context. "An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied, however much later wisdom may recommend the inclusion." Frankfurter, *Some Reflections*, etc., supra, p. 534.[5]

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[5] Recently we observed in *Patagonia Corp. v. Board of Gov. of Fed. Res. Systems*, 517 F.2d 803 (9th Cir. 1975), at p. 813, that it is logical to assume that where one word is used one way in the statute it is used that way throughout, and that:

> "Our obligation in the imperfect process of statutory construction is to effectuate the Congressional intent, and, bey-

[footnote continued]

The Congress, in this situation, is presumed to have known very well the scheme it constructed. It explicity provided that a fund was to be distributed in accordance with the language and formula it set forth. It seems to me to be apparent that some potential for disparity in distribution must have been present in the minds of the Congressional constructors (here the disparity is only .016 of the total fund) and that here, as judges, we are not, therefore, confronted with the question of what the Congress would have intended had it been presented with the problem. The disparity is miniscule and we should not reconstruct the statutory distribution under some guise of judicial interpretation in order to subserve some evanescent Congressional intention or to promote some perceived but wholly obscure and mathematically unachievable social value or policy.

Although this statutory scheme has been amended several times since its adoption on December 18, 1971, the Congress has not corrected this alleged mistake. In spite of the apprarent ease of amendment and the required annual reports, infra, there is no evidence in this case that the Secretary or the appellant Regional Corporations have presented their theory of mistake and inequity to Congress. Future Congressional appropriations will be made to fund the periodic distributions to the Regional Corporations. Sec. 6, 43 U.S.C. § 1605. By Congressional mandate the Secretary is required to

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ond doubt, the best evidence of that intent is the text of the statute itself. (cite omitted) We have found no evidence of a different Congressional intent that could justify our departing from the self-evident meaning of the statutory provisions here in question."

See also: *United States v. Gertz*, 249 F.2d 662, 665 (9th Cir. 1957), expressing the same view.

submit to the Congress annual reports on the implementation of ANSCA (Sec. 23, 43 U.S.C. § 1622) until 1984 with a final report in 1985 "with such recommendations as may be appropriate." It may be argued with some force that the Congress intended to reserve to itself the right and power to remedy real or imagined deficiencies or inequities. If in fact a mistake has been made or a substantial unintended inequity exists, Congress has ample time to correct it if it wishes to do so. In conclusion, I would affirm the district court and send the Secretary and appellants to the Congressional committee rooms to seek relief rather than to risk disruption of the comprehensive whole by a judicial transplant.[6]

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[6] *United States v. Olympic Radio & Television, Inc.*, 349 U.S. 232, 236, 75 S.Ct. 733, 736, 99 L.Ed. 1024 (1955), teaches us that:

> "We can only take the [statute] as we find it and give it as great an internal symmetry and consistency as its words permit. We would not be faithful to the statutory scheme, as revealed by the words employed, if we gave [a word or phrase] a different meaning . . . than it has in the other parts of the same chapter."
>
> * * * * * *
>
> "The fact that the construction we feel compelled to make favors the taxpayer on the cash basis and *discriminates* against the taxpayer on the accrual basis may suggest that changes in the law are desirable. But if they are to be made, Congress must make them." [emphasis supplied]

APPENDIX B

The ALEUT CORPORATION et al., Plaintiffs,

v.

ARCTIC SLOPE REGIONAL CORPORATION et al., Defendants.

DOYON LIMITED, and Bering Straits Native Corporation, Plaintiffs,

v.

Thomas S. KLEPPE, Secretary of the Interior, et al., Defendants.

Civ. Nos. A75-53, A75-89.

United States District Court, D. Alaska.

July 19, 1976.

* * *

Gary M. Thurlow, Croft & Thurlow, Anchorage, Alaska, Stephen M. Truitt, Wald, Harkrader & Ross, Washington, D.C., for The Aleut Corp.

Michael M. Holmes, Faulkner, Banfield, Doogan & Holmes, Donald Beighle, Juneau, Alaska, Richmond F. Allan, Weissbrodt & Weissbrodt, Washington, D.C., for Sealaska Corp.

Milton M. Souter, Kodiak, Alaska, Edward Weinberg, Jay R. Weill, Duncan, Brown, Weinberg & Palmer, Washington, D.C., for Koniag, Inc.

Joe P. Josephson, Anchorage, Alaska, Howard S. Trickey, Washington, D.C., for Chugach Natives, Inc.

Robert M. Goldberg, Anchorage, Alaska, for AHTNA, Inc.

Edward A. Merdes, Merdes, Schaible, Staley & DeLisio, Fairbanks, Alaska, Richard A. Derham, James Wickwire, Davis, Wright, Todd, Riese & Jones, Seattle, Wash., for Arctic Slope Regional Corp.

Barry W. Jackson, Fairbanks, Alaska, for Bering Straits Native Corp.

Eric Treisman, Dillingham, Alaska, James R. Atwood, Covington & Burling, Washington, D.C., for Bristol Bay Native Corp., Inc.

William K. Jermain, Hal R. Horton, Birch, Jermain, Horton & Bittner, Anchorage, Alaska, for Calista Corp.

Allen McGrath, John R. Snodgras, Graham & James, Anchorage, Alaska, for Cook Inlet Region, Inc.

William Timme, Fairbanks, Alaska, Francis J. O'Toole, Arthur Lazarus, Jr., Fried, Frank, Harris, Shriver & Kampelman, Washington, D.C., for Doyon, Ltd.

Joseph Rudd, Ely, Guess & Rudd, Anchorage, Alaska, Richard Baenen, Washington, D.C., for Nana Regional Corp.

G. Kent Edwards, U.S. Atty. for Alaska, Anchorage, Alaska, and John D. Roberts, Asst. U.S. Atty., for Thomas S. Kleppe and William E. Simon.

Ronald H. Bussey, Burr, Pease & Kurtz, Inc., Anchorage, Alaska, for Eklutna, Inc., amicus curiae.

MEMORANDUM AND ORDER

JAMES A. VON DER HEYDT, Chief Judge.

These actions are before the court on motions for partial summary judgment in No. A75-53 Civil and for summary judgment in No. A75-89 Civil. The two cases were consolidated for the consideration of the motions now before the court since the motions for summary judgment in *Doyon, Ltd. v. Kleppe* raise a legal issue which is virtually identical to that raised by one of the motions for partial summary judgment in *Aleut Corporation v. Arctic Slope Regional Corporation.* Accordingly, this memorandum and order will address the issues in both cases.

Since the court has previously set forth much of the background information involved in *Aleut Corporation v. Arctic Slope Regional Corporation,*[1] those matters will not be reiterated herein. For present purposes, it is sufficient to state that in the *Aleut* case the court is concerned with the interpretation and application of section 7(i) of the Alaska Native Claims Settlement Act, 43 U.S.C. §1606(i) (Supp. IV, 1974).[2] In that case there are three principal issues now before the court. These are:

1. Does the consideration paid for the right to seek, to lease, to extract a resource from, or to acquire any interest in a subsurface estate constitute revenue under section 7(i) of ANCSA where the resource (a) is not actually found, or (b) is found in a quantity or quality

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[1] *See*, 410 F.Supp. 1196 (D.Alaska, 1976).

[2] While there were several amendments to the Act in January of 1976, *see*, Pub.L. 94-204, Jan. 2, 1976, 89 Stat. 1145, 43 U.S.C.A. §1604 et seq. (Supp. 1, March, 1976) they do not directly affect any of the matters now before the court.

inadequate to market commercially, or (c) where production in fact never occurs by the party paying said consideration, or his successors in interest;

2. (a) Whether the term "all revenues", as used in section 7(i) of ANCSA, includes services, in kind payments, rights, benefits, assistance to third parties, and any other form of nonmonetary consideration; (b) Are such benefits included whether or not the compensation for the resource is affected thereby;

3. Whether the revenues covered by section 7(i) of the ANCSA are to be divided on the basis of the number of "Natives enrolled" in each region or on the basis of the shareholders of each region, thereby excluding from that calculation Natives that have elected to take title to their former reserves pursuant to section 19(b) of the Act. It is this latter question that is at issue in *Doyon, Ltd. v. Kleppe,* except that instead of being concerned with 7(i) revenues, the *Doyon* case involves distributions from the Alaska Native Fund pursuant to section 6(c) of the Act. Accordingly, the court first will address the two issues unique to the *Aleut* case and thereafter consider the enrollment issue that is common to both the *Aleut* and *Doyon* cases.

Section 7(i) provides in relevant part that, "Seventy per centum of all revenues received by each Regional Corporation from the timber resources and subsurface estate . . . shall be divided annually . . . ." With the exception of Arctic Slope Regional Corporation, the eleven other regional corporations contend that payments made for the right to seek or extract a resource from the subsurface estate, or to acquire any interest therein should be subject to section (i) irrespective of whether the resource is actually found or production actually occurs in fact. In opposition to this contention,

Arctic Slope argues[3] that sharing is not required unless the subsurface estate is actually physically diminished; that is, a bonus payment, for example, would not be subject to 7(i) unless actual production occurs. In support of its argument, Arctic Slope urges the court to draw an analogy to the tax treatment of bonus payments relative to the allowance of the cost depletion deduction.

While the parties have spent considerable time and effort in briefing the issue, the court finds it to be rather clear that Arctic Slope's contentions are without merit. The crucial language is "All revenues . . . from the . . . subsurface estate . . . ." As counsel for Bristol Bay Native Corporation puts it, "Subsurface estate, like any estate in real property, constitutes a bundle of rights and not merely a bundle of rocks."

The statutory language is clear and is in no way conflicting with either other sections of the Act or the legislative history thereof. "All revenues" is a broad term. "From the . . . subsurface estate", given a reasonable reading in the context of section 7(i), must mean revenues received because of the acquisition of an interest in the subsurface estate.

The court finds Arctic Slope's reliance on the law of cost depletion to lack relevancy for two principal reasons. First, requiring that 7(i) only be triggered upon the actual production of minerals is in conflict with the

[3]Arctic Slope additionally has questioned the propriety of deciding this issue at this time. While the court initially shared Arctic Slope's concern, upon consideration it is apparent that the matter should be decided at this stage of the litigation. The parties have demanded an immediate accounting. This issue, as well as several others closely related, must be decided before a final and complete accounting is possible.

statutory language. Second, ANCSA is really *sui generis* with goals and purposes that are vastly different from those underlying the federal tax laws. Accordingly, the court finds that the sharing requirements of section 7(i) do not depend on whether a subsurface resource actually is discovered, produced, or marketed.

Turning to the second issue unique to the *Aleut* case, the non-monetary benefits question, it appears that all of the parties agree that as a general principle the term "all revenues" should include benefits of every sort so long as such are received by a regional corporation or third persons in exchange for rights granted in the timber resources and subsurface estate received by a regional corporation pursuant to ANCSA. Judge Gasch has also reached this conclusion.[4] The disagreement appears to be over how such non-monetary benefits are to be valued, problems of proof, and the question of whether a non-monetary benefit can be said to be received because of an acquisition of an interest in the subsurface estate where it is impossible to prove that any monetary benefits received because of such acquisition were affected thereby, that is, are less than they would have been but for the receipt of the non-monetary benefits.

The court agrees that non-monetary benefits received in exchange for the acquisition of an interest in the timber resources or subsurface estate of a regional corporation are indistinguishable from monetary benefits, and fall within the terminology "all revenues" as used in section 7(i). Therefore, the court finds that they are subject to distribution. Additionally, it is of no

[4]*Doyon, Limited v. Nana Regional Corporation, Inc.*, Civil No. 1531-74 (D.C.D.C., May 5, 1976).

consequence, for the purposes of section 7(i), that the benefits are paid to third parties so long as they are generated because of, and in exchange for, the acquisition of an interest in the timber resources and subsurface estate received by a regional corporation, pursuant to ANCSA.

While valuation and proof of in-kind and indirect benefits will have to await further discovery and/or the appointment of a special master, the court will establish certain general guidelines at this time. It is apparent that non-monetary and indirect benefits should be discouraged in the context of section 7(i) because of the problems that they invite. For that reason and because only the contracting region has control over the types of contracts that it will enter into, the court finds that the revenue controlling corporation will have the burden to prove by a preponderance of the evidence that in-kind or indirect benefits were not received in exchange for or because of the granting of an interest in its timber resources or subsurface estate. Absent such proof, non-monetary and indirect benefits will be considered subject to the sharing requirement of section 7(i).[5] Further, non-monetary benefits will be valued, for the purposes of section 7(i), as the greater of either:

(a) the fair market value of the non-monetary benefit received;

(b) the cost or detriment to the entity furnishing the non-monetary benefit; or

(c) the difference between the royalty or other cash consideration actually received and that which would

[5]The court recognizes that certain types of agreements such as performance guarantees do not give rise to additional 7(i) revenues.

have been received but for the furnishing of the non-monetary benefit.[6]

The final issue before the court is whether the Natives that have elected to acquire their former reserves pursuant to section 19(b) of the Act, 43 U.S.C. §1618(b) (Supp. IV, 1974), should be counted as Natives enrolled in each region for the purposes of computing the percentages used in making distributions under section 7(i) of the Act and section 6(c), 43 U.S.C. §1605(c) (Supp. IV, 1974). The question is a complex one involving very significant sums of money.[7]

The statutory framework is as follows:[8]

Section 7(i), 43 U.S.C. §1606(i) (Supp. IV, 1974), "Seventy per centum of all revenues . . . shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this sec-

[6]If, during the course of this litigation, it appears that these guidelines are causing too great a burden on the liquidity of the various regional corporations the court may reconsider them.

[7]In the context of section 6(c) distributions approximately 15.4 million dollars is involved. Further, in relation to section 7(i) distributions, if the 19(b) Natives are counted, Doyon Limited and Bering Straits Regional Corporation stand to gain approximately 16 million dollars per billion distributable under section 7(i).

[8]The "Natives enrolled" language is also used in section 12(b), 43 U.S.C. §1611(b) (Supp. IV, 1974). That section provides in relevant part, "The difference between twenty-two million acres and the total acreage selected by Village Corporations pursuant to subsection (a) of this section shall be allocated by the Secretary among the eleven Regional Corporations . . . on the basis of the number of Natives enrolled in each region." However, that section is not now before the court and presumably will never be as the action of the Secretary is specifically excluded from judicial review.

tion according to the number of Natives enrolled in each region pursuant to section 1604 of this title."

Section 6(c), 43 U.S.C. §1605(c) (Supp. IV, 1974), "After completion of the roll prepared pursuant to section 1604 . . . all money in the Fund . . . shall be distributed . . . among the Regional Corporations organized pursuant to section 1606 of this title on the basis of the relative number of Natives enrolled in each region."

Section 5(a) and (b), 43 U.S.C. §1604(a) and (b) (Supp. IV, 1974), "The Secretary shall prepare within two years from December 18, 1971, a roll of all Natives who were born on or before, and who are living on, December 18, 1971. . . . The roll prepared by the Secretary shall show for each Native . . . the region and the village or other place in which he resided on the date of the 1970 census enumeration, and he shall be enrolled according to such residence."

Section 19(b), 43 U.S.C. §1618(b) (Supp. IV, 1974), "Notwithstanding any other provision of law . . . any Village Corporation . . . may elect within two years to acquire title to the surface and subsurface estates in any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971. . . The Secretary shall convey the land to the Village Corporation . . . and the Village Corporation shall not be eligible for any other land selections under this chapter or to any distribution of Regional Corporation funds pursuant to section 1606 of this title, and the enrolled residents of the Village Corporation shall not be eligible to receive Regional Corporation stock."

In the *Doyon* case the Secretary of the Interior has determined that the Natives enrolled in villages that

elected to exclude themselves from certain provisions of ANCSA pursuant to section 19(b), in exchange for receiving title to their former reserves, should not be counted for the purposes of section 6(c).[9] No such determination has been made in regard to section 7(i) since the Secretary is not involved in distributions pursuant to that section. Since the matter is purely one of statutory interpretation the court, while giving some deference to the Secretary's decision, must examine the matter on its own merits.

While the language of the sections is clear and would require that 19(b) Natives be counted for the purposes of sections 6(c) and 7(i), the court has the authority and the duty to examine the legislative history of ANCSA and the other sections of that Act. *Train v. Colorado Public Interest Research Group, Inc.*, ____ U.S. ____, 96 S.Ct. 1938, 48 L.Ed.2d 434, 44 U.S.L.W. 4717 (1976). Neither the legislative history of the Act nor the other sections thereof convince the court that Congress misspoke when it used the terminology "Natives enrolled in each region."

The strongest arguments of those opposing the position of Doyon and Bering Straits are first that Congress attempted to create equality in the operation of the provisions of ANCSA where that was feasible; second, that section 7(j), 43 U.S.C. 1606(j) (Supp. IV, 1974) establishes that the Regional Corporations receive 6(c) and 7(i) monies for the benefit of their shareholders and villages within their respective regions that have not made section 19(b) elections; and, finally, that by making such elections the villages disenrolled their

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[9] Six villages have made the 19(b) election. These are Tetlin, Venetie and Arctic Village in the Doyon Region, and Elim, Gambell and Savoonga in the Bering Straits Region.

members from the Regional Corporations.[10] While the court has carefully considered all three contentions, problems exist with each of them. As to the equality argument, it is sufficient to say that ANCSA cannot and does not create precise equality. There are simply too many variables. The section 7(j) contention shows no more than the fact that certain monies are to filter down to the individual shareholders and to the Village Corporations. This in no way detracts from the fact that ANCSA was designed to create a strong and viable Regional Corporation structure that possibly could have been severely weakened in one or more Regions had more villages made the section 19(b) elections. Finally, the disenrollment argument suffers fatally because of the lack of any statutory support and the specific reference in Section 6(c) to the actual roll prepared pursuant to section 5(a) and (b).

The Alaska Native Claims Settlement Act is complex legislation. Obviously, it is possible that Congress made certain errors and omissions in its enactment. However, Congress utilized the terminology "Natives enrolled in each region" repeatedly. Additionally, it used "stockholder" language often when that was appropriate. The court is unwilling to find that Congress confused the two terms.

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[10]Those opposing Doyon and Bering Straits have cited the court to one provision in the House Report that does support their position. It provides that "Each corporation must share its mineral revenues with the other 11 corporations on the basis of the relative number of stockholders in each region." H.Rep. No. 92-523, 92d Cong. 1st Sess., 6 (1971), 1971 U.S. Code Cong. & Admin. News, Vol. 2, p. 2196. However, the court is constrained to find that this one item of legislative history is not entitled to much weight in view of the repeated use of the term "Natives enrolled" throughout the Act itself.

When Congress passed ANCSA in 1971 it could not and did not know which villages would elect to acquire title to their former reserves pursuant to section 19(b). If none had so elected, precise mathematical equality would exist between the Regional Corporations for the purposes of section 7(i) and 6(c). Such was not the result. The percentages favor slightly Doyon and Bering Straits when considered on a per capita basis, based on the number of stockholders in each region. Whether Congress intended this is not clear. Perhaps it did. Perhaps Congress was concerned that so many villages would elect under 19(b) within a given region that such a region would have its existence as a viable corporate entity threatened. Given an uncertain Congressional purpose, clear statutory language, and the fact that the members of section 19(b) villages are still within the framework of ANCSA,[11] the court finds that the Natives that are enrolled in villages that elected to take title to their former reserves pursuant to section 19(b) are natives enrolled in the regions of Doyon and Bering Straits for the purposes of section 6(c) and 7(i).

Accordingly, IT IS ORDERED:

1. THAT in the case of *Aleut Corporation v. Arctic Slope Regional Corporation,* Civ. No. A75-53, the motions for partial summary judgment are granted and denied in conformity herewith;

2. THAT in the case of *Doyon, Limited v. Kleppe,* Civ. No. A75-89, the motion of Doyon and Bering Straits for summary judgment is granted and the cross motions for summary judgment are denied.

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[11]Compare section 19(b) villages with 19(a) villages.

3. THAT in the case of *Doyon, Limited v. Kleppe*, Civ. No. A75-89, counsel for Doyon shall prepare and submit an appropriate final judgment form that evidences thereon the signatures of one counsel for each party in A75-89 and that reflects any comments that each may have in regard to the entry of a final judgment in A75-89.

APPENDIX C

[Filed May 25, 1978]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-3658

DOYON, LIMITED, et al.,
Plaintiffs-Appellees,

vs.

BRISTOL BAY NATIVE CORP.,
Defendant-Appellant.

No. 76-3681

DOYON LIMITED, et al.
Plaintiffs-Appellees,

vs.

ARCTIC SLOPE REGIONAL CORP.,
Defendant-Appellant.

No. 76-3682

DOYON LIMITED, et al.,
Plaintiffs-Appellees,

vs.

CALISTA CORP.,
Defendant-Appellant.

No. 76-3683

DOYON LIMITED, et al.,
Plaintiffs-Appellees,

vs.

KONIAG, INC.,
Defendant-Appellant.

No. 76-3684

DOYON LIMITED, et al.,
Plaintiffs-Appellees,

vs.

NANA REGIONAL CORP., INC.,
Defendants-Appellants.

No. 76-3685

DOYON LIMITED, et al.,
Plaintiffs-Appellees,

vs.

SEALASKA CORP.,
Defendant-Appellant.

No. 76-3710

DOYON LIMITED, et al.,
Plaintiffs-Appellees,

vs.

COOK INLET REGION,
Defendant-Appellant.

No. 76-3754

DOYON LIMITED, et al.,
Plaintiffs-Appellees,

vs.

AHTNA INC.,
Defendant-Appellant.

No. 76-3748

DOYON LIMITED, et al.,
Plaintiffs-Appellees,

vs.

13TH REGIONAL CORP.,
Defendant-Appellant.

No. 77-1166

DOYON LIMITED, et al.,
Plaintiffs-Appellees,

vs.

CHUGACH NATIVES, INC.,
Defendant-Appellant.

No. 77-1084

DOYON LIMITED, et al.,
Plaintiffs-Appellees,

vs.

CECIL D. ANDRUS, Secretary of the Interior; W. MICHAEL BLUMENTHAL, Secretary of the Treasury,
Defendants-Appellants.

Appeal from the United States District Court for the District of Alaska

Before: WRIGHT, CHOY and ANDERSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and a majority of the panel has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and only one judge of the court has voted to grant rehearing en banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

[Seal]

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Mr. Arthur Lazarus, Jr.
Fried, Frank, Harris, Shriver & Kampelman
Suite 1000, The Watergate 600
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037

SEP 25 1974

Dear Mr. Lazarus:

This replies to your letter of May 21, 1974, written on behalf of Doyon, Ltd., concerning distributions of the Alaska Native Fund pursuant to Section 6(c) of the Alaska Native Claims Settlement Act. The matter was further discussed in detail during your meeting with Associate Solicitor Reid P. Chambers and members of his staff on August 12, 1974.

You point out that the distribution of December 18, 1973, was based on a calculation of Doyon's share which excluded some 410 persons who were enrolled to the villages of Tetlin, Venetie, and Arctic Village, and erroneously included 71 persons who were enrolled to the village of Cantwell. The Cantwell error will be corrected by adjustment at the time of the next distribution, so as to include the Cantwell people in the Copper River Native Association region (Ahtna, Incorporated) rather than in the Tanana Chiefs' Conference region (Doyon, Ltd.). We do not agree, however, with your position that the Tetlin, Venetie, and Arctic Village enrollees should be

included as Doyon enrollees for Section 6(c) distribution purposes.

The village corporations for Tetlin, Venetie, and Arctic Village, all located within the geographic boundaries of Doyon's region, elected to acquire title to the surface and subsurface estates of the lands of their former reserves, pursuant to Section 19(b) of the Settlement Act. This rendered such corporations ineligible for other land selections under the Act and for any distributions of Doyon's funds pursuant to Section 7, and made the "enrolled residents of the Village Corporation" ineligible to receive Doyon stock.

Although Section 6(c) provides for distributions of the Alaska Native Fund among the regional corporations "on the basis of the relative numbers of Natives enrolled in each region" (similar language is used for other purposes in Sections 7(i) and 12(b)), we do not believe that the Congress could have intended to include for such purposes those individuals rendered ineligible by Section 19(b) to participate in the redistributions required by Section 7(g) and other regional corporation stockholders' benefits. Such an application of Section 6(c) would result in a substantial and unjustified disparity of benefits among the stockholders of the various regional corporations which cannot be rationally supported.

We must, therefore, deny your request to adjust the past distributions and to make future distributions of the Fund on the basis of including in the regional corporations enrollment those persons enrolled to villages whose corporations elected to take title to their reserves under Section 19(b).

Sincerely yours,
/s/ Kent Frizzell
Solicitor